

IN THE SENATE OF THE UNITED STATES.

APRIL 1, 1880.—Ordered to be printed.

Mr. LOGAN, from the Committee on Military Affairs, submitted the following

REPORT:

[To accompany bills S. 192 and 577.]

The act of July 28, 1866, entitled "An act to increase and fix the military peace establishment of the United States, to be called the Army of the United States, created new offices or original vacancies in the line and staff of the Army. The provision of this act, section 13, is in these words:

And be it further enacted, That the Quartermaster's Department of the Army SHALL HEREAFTER consist of one Quartermaster General, with the rank, pay and emoluments of a brigadier-general; six assistant quartermasters-general, with the rank, pay, and emoluments of colonels of cavalry; ten deputy quartermasters-general, with the rank, pay, and emoluments of lieutenant-colonels of cavalry; fifteen quartermasters, with the rank, pay, and emoluments of majors of cavalry, and forty-four assistant quartermasters, with the rank, pay, and emoluments of captains of cavalry; and the vacancies hereby created in the grade of assistant quartermasters shall be filled by selection from among the persons who have rendered meritorious services as assistant quartermasters of volunteers during two years of the war."

This act created a certain number of new offices or original vacancies of colonel, lieutenant-colonel, major and captain in the Quartermaster's Department, and did not specify how these vacancies were to be filled, except in the grade of assistant quartermaster.

This was an organic act. It repealed in terms all laws, or parts of laws, inconsistent with its provisions. But for the provision contained in section 31, that it should not be so construed as to vacate the commission of any officer then properly in service, every officer in the army, by the act, would have been out of service, and could only have held office in the new "military peace establishment" by reappointment by the President, by and with the advice and consent of the Senate.

The word "fix," as used in the title of the act, is synonymous with "establish." (Webster.)

The nominations to these new offices were sent to the Senate by the President, with the full concurrence of the Secretary of War, Hon. E. M. Stanton, and the Quartermaster-General of the Army. They were confirmed by the Senate, after full investigation by its military committee, and duly commissioned by the President. These appointments were made by the President, by and with the advice and consent of the Senate, *by selection*. The officers accepted them, gave the required bond, and entered on their respective duties. The moment this was done, your committee believe, their right to the office and their rank or positions in their grades, with other incidents of the office, became vested,

and cannot be disturbed, except by an act of Congress abolishing the offices, or by sentence of a court-martial, approved by the President. (Curac vs. Curac, lessee, 2 Wheaton, 277; Society & Co. vs. New Haven, 8 Wheaton, 493; Steamship Co. vs. Jolliffe, 2 Wall., 457-8; Planters Bank vs. Sharp, 6 Howard, 319.)

The right of each officer to his present rank or position in his grade is an important right. It entitles him to promotion, according to his rank, to higher offices in his corps that become vacant by the *casualties of the service*. This is the right which the promoters of these bills desire to have taken from their brother officers and conferred upon them. In other words, to suspend the laws regulating promotions in the Army until they acquire certain new rights to which, we believe, they are not, and never have been, either in law or equity, entitled.

The act fixing the military peace establishment, of July 28, 1866, on which this extraordinary demand is based, was passed at the close of a great war, in which the Regular Army numbered but thirty regiments, and the Volunteer Army to more than a million of men. It was then the interest of the government to secure the best ability developed by the war for the various new offices created by the act. The record of each officer in the Quartermaster's Department who was appointed to the new offices under that act, was fresh in the minds of the President and the Senate, and it is but fair to presume that the selections were made in the light of that record.

It is claimed by the promoters of these bills that under the 4th article of the Army Regulations of 1863, the words: "All vacancies in established regiments and corps, to the rank of colonel, shall be filled by promotion according to seniority, except in cases of disability or other incompetency," legally bound the President and Senate to appoint to the newly created offices in the corps by promotion from the corps as previously established. But if it be assumed that this Army regulation could constitute a binding rule for the President and Senate, in the exercise of the appointing power conferred by the Constitution, its language could nevertheless have no such meaning or effect as these officers claim for it.

The regulation purports to apply only to appointments to vacancies in established regiments and corps. To appointments to vacancies which might occur in the corps, as it was established before the act passed, it did apply. In like manner it applied to all appointments to vacancies which might occur after its new establishment should be consummated. But to the newly created offices, to the original vacancies, vacancies not in the established corps, but specially created in the organization, we believe it does not purport to apply, and does not apply. The "established corps" as it existed before the passage of the act was not the established corps which existed after the passage of the act.

It is true that the corps bore the same name before the enactment of the law, and it is also true that the new law, with all its changes, left a considerable part of the old regulations of the Quartermaster's Department still in force; but in that which constitutes an essential feature in all military establishments, the number of the officers, and to the extent of the changes in their number, it became a newly-established corps. The act, in form as well as in substance, established the Quartermaster's Department as an increased and to the extent of the increase a new corps.

It is entitled "An act to increase and fix the military peace establishment of the United States." It superseded all former acts and regulations.

And but for section 31 providing that it should not be construed as to vacate any commission of any officer then in the service, all commissions in the Quartermaster's Department would have been vacated, a proviso, we contend, that would be unnecessary and out of place if the law had not been regarded by its framers as a legal reconstruction of the Army.

It created many original vacancies in the line and staff, which were filled by selection from those officers who had won distinction during the war.

It provided that the *Quartermaster's Department of the Army* SHOULD THEREAFTER CONSIST of the offices indicated in the act.

The suggestion that the establishment of thirteen (13) new offices in old grades is any less an establishment pro tanto of the corps than would be the creation of thirteen new offices in new grades we believe has no substantial foundation.

A new office is a new office whatever its grade may be, and an addition of new offices is pro tanto a new establishment of the corps.

If the words "in established regiments and corps" had been omitted, the regulation might be broad enough to cover appointments to the thirteen new offices, *which were not vacancies in established corps, but were original vacancies, and had to be first filled before the corps, as to its new offices, became an established corps*; for the comprehensive words "all vacancies" would then stand without restriction or qualification, and the regulation, so modified, being broad enough to cover these appointments, might have furnished a binding rule for the President and Senate in the exercise of the appointing power, provided there was nothing in the Constitution to prevent.

But the words "in established regiments and corps" were not omitted from the regulations of 1863. On the contrary, they were introduced into that regulation, at its original adoption in 1857, as a substitute and equivalent for other words which had been used in all former corresponding regulations, but were omitted in that of 1857. Their manifest object and effect were to give these new regulations the same sense as the corresponding old regulations, under a new and improved form. They restrict the application of the regulations to accidental vacancies in newly established corps, and exclude its application to original vacancies in newly created offices, and thus leave the rule exactly where it always stood.

The corresponding regulations of 1813, 1814, 1815, and 1821 were in these words:

The original vacancies will be supplied by selection, accidental vacancies by seniority, except in extraordinary cases.

The unqualified word "vacancy," as used in paragraph 21 of the Army Regulations, has been held by the War Department to apply to an office once filled that has become vacant by the casualties of the service.

The regulations of 1825 are in these words:

The Executive will fill original vacancies, when created, by selection; accidental vacancies, below the rank of brigadier-general, by promotion according to seniority, except in extraordinary cases.

The following are the regulations of 1841 and 1847:

Original vacancies will be supplied by selection; accidental vacancies, to the rank of colonel, by promotion according to seniority, except in extraordinary cases.

By a substitution of equivalent new words in the regulations of 1857 and 1863, the same rule is preserved in an improved form.

The following extract from the report of the Military Committee of the Senate of the 45th Congress is in point :

There is no doubt that the vacancies created by the act of 1866 were original vacancies, and could be filled by selection unless the law previously in force was changed in the new edition of the regulations published in 1857.

There is also no question that, in the absence of legislation limiting his constitutional power of appointment, the President can fill all vacancies in the Army by selection, and the only limitation, if any, upon his power to fill the vacancies in the Quartermaster's Department created by the law of 1866 by selection is contained in the Army Regulations of 1863 above quoted.

It is a well settled principle of law that in the construction of statutes a revision thereof shall be held to work no change in the law, unless the language of the revision clearly shows such change to have been intended.

If the construction is doubtful, it will be presumed that the meaning of the law is the same as it was before. (*Douglass v. Howland*, 24 Wendell, 45-47.)

Now, do the Army Regulations of 1857 clearly show an intention to change the rule previously in force ?

That depends upon the question whether the rule in the regulations of 1857 necessarily has a meaning inconsistent with that of the previous rule. When is a regiment or corps established, within the meaning of that clause ?

It is clear that it is not thus established merely by the law which requires and fixes it.

If that were so, the right to fill vacancies by selection would thereby be wholly taken away from the President.

The true meaning of the rule, we believe, is, that the regiment or corps is established only when all the officers belonging to it by law have once been filled.

Let us suppose, by way of illustration, that a new regiment is added to the Army by law.

When is that regiment established, within the meaning of the Army Regulations of 1863 ? Is it established by the appointment of a part of its officers only ? It seems to us that it cannot be ; otherwise the appointment of its second lieutenants would take away from the President the right to appoint its first lieutenants. If the appointment of a part of the officers establishes the regiment within the meaning of this rule, then the officers thus appointed would be entitled to promotion to the vacancies above them which had not been filled.

If the appointment of a part only of its officers is an establishment of a regiment, then the President could only preserve his right to fill the higher regimental offices by selection by filling them in their order, beginning with the highest. Yet the regiment is established at any time as to the officers actually appointed and confirmed, and they are entitled to promotion if a vacancy happens in a higher office which has once been filled, but until all the officers have been appointed the regiment is only partially established. *It is not established until all the offices in it have been filled.*

The same rule applies to a corps of the Army. Until the offices in a corps have been filled the corps is not established, though it may be partially so.

Before the act of July 28, 1866, went into operation the Quartermaster's corps was established with a certain number of officers.

When the act went into force that corps consisted of a larger number of officers.

It was not an established corps because the offices had not been filled, but a corps only partially established. It was precisely like a regiment in which only the second lieutenants have been appointed.

It became established under the law of 1866 only when the vacancies created by that law had been filled, and until that time the President had the right to supply vacancies by selection.

Your committee also regard the President's action, hereinbefore referred to, as equitable and just. By it he recognized and rewarded the distinguished services of some of the volunteer officers in the war.

Conceding, for the purposes of this case, that there is room for doubt as to the proper interpretation of the nineteenth paragraph of the Army Regulations of 1863 by the President and the Senate, the Secretary of War, the Adjutant-General, and the Quartermaster-General, in the matter of these appointments, where are we to look to have these doubts resolved, to learn the reason and spirit of the rule, or the cause which led the department to adopt it ? Not to Congress, for Congress had no hand in the preparation of it. Congress simply gave it the force of law until other regulations could be prepared and acted on by that body ; no other

regulations, were prepared, and those of 1863 have been changed and modified by General Orders of the War Department up to the present time.

The executive department of the Army, where these rules are prepared and the reason and spirit of them are known and the cause which gave rise to them is understood, would seem to your committee to be the true source of light; and the most effectual way of discovering the real meaning of the rules is the interpretation that department places upon them.

In determining the construction of the nineteenth paragraph of the Army Regulations of 1863, the history of the rule and the language of previous rules for which it is a substitute, and the ends contemplated, are to be considered (Henry v. Tilson, 17 Vermont, 479; 3 Maule and Selwyn, 510.)

Your committee believe that the construction placed upon the rule by the executive department in which it originated, and the established principle of that department thereunder, are conclusive as to the meaning of the rule and as to the legality of the appointments complained of.

The following is an extract from the report of the Senate Committee on Military Affairs of the Forty-fifth Congress on this subject:

* * * * *

* It is alleged by the memorialists that the Attorney-General of the United States, in an opinion given to the Secretary of War January 22, 1872, put a construction upon the act of 1866 favorable to the claims of these petitioners.*

Your committee have thoroughly examined that opinion. It was evidently prepared without much consideration. It simply discusses the question whether the term "all vacancies" in the Army Register of 1863 is broad enough to include the vacancies created by the act of 1866.

It does not in any way allude to the question whether the Quartermaster's Corps was established before those vacancies had been filled, which is really the only question in the case.

Your committee do not regard an opinion which makes no allusion whatever to the only point in controversy as having any weight.

* It is alleged by the memorialists * that in the cases of Col. N. H. Davis, Inspector-General, Lieut. Col. Absalom Baird, Assistant Inspector-General, and Major William Myers, Quartermaster, Congress, by acts approved June 8, 1872, and June 20, 1874, established the principle for which they now contend.

Your committee find that the cases of Davis and Baird were not analogous to this, and furnish no precedent for the legislation now asked for. The case of Myers was much aided by a general but unfounded belief that the Attorney-General had carefully examined the question and given an opinion in his favor covering the questions in controversy. Senate bill No. 357, accompanying this memorial * provides that the rank of the officers named therein shall date from July, 1866. Your committee find, however, that if the rule of promotion according to seniority had obtained, none of them, except Lieutenant-Colonel Eddy, deceased, could have been promoted under the act of 1866 until after the passage of the act of March 3, 1875.

In this respect the bill gives to all the memorialists but one nine years of rank to which they are not entitled, even upon the principle contended for by them.

The officers whom it is intended by this bill to overslaugh were appointed in 1866, upon a construction of the Army Regulations which has always prevailed and now prevails in the War Department. That construction was then adopted by the President and the Senate after full debate. This bill proposes, after the lapse of nearly twelve years, to reverse that action, and, upon a construction which at best is doubtful, to degrade those officers whose appointment was due only to their merit and distinguished services.

We believe such a precedent to be in the highest degree dangerous to the interests of the Army. It is an advertisement that no action of the President and Senate is to be final, and that after any lapse of time it may be overturned. It is true that no act of one Congress is binding upon another, but it is nevertheless true that in matters of this kind decisions solemnly made, and constructions long established, should not be allowed to be drawn in question.

This action of this Congress may be reversed by that of the next, and that by the action of another, and so on *ad infinitum*. The passage of this bill would tend, in our judgment, to bring about a state of things under which no officer in the Army can feel himself secure from attack, and the energies of gallant men, which should be given to

the service of their country, will be wasted in paltry intrigues to supplant each other. For these reasons your committee report adversely to said bill and memorial, and recommend that the said bill do not pass.

* The memorialists and petitioners herein referred to consist of the officers named in Senate bills 192 and 577. (Easton, Van Vliet, and others.)

Your committee find there is nothing in section 13 of the act of July 28, 1866, to indicate that the vacancies therein created were not original vacancies which the President uniformly had authority to fill by selection from the Army or civil life, irrespective of the laws governing promotion, which after the grades were once filled came into full efficacy.

These vacancies were filled as original appointments by the President, so confirmed by the Senate, and so gazetted. For thirteen and fourteen years the officers who were thus appointed have acted unquestioned as duly commissioned and sworn. No legal requisite was omitted in the form and manner of their appointments, and so far as the appointing power was concerned the act of appointment and confirmation was complete. The United States Supreme Court decided, in *Marbury vs. Madison* (1st Cranch 137), that when a commission is signed by the President the appointment is made, and the commission complete when the seal is affixed.

An act within the jurisdiction of the President of the United States, lawfully done by him, cannot be reversed by one of his successors. (6 Opinions U. S. Attorneys General, pp. 506 and 693.) From the foregoing it necessarily follows that the present Executive or Senate cannot lawfully revise the action of their predecessors until the courts of the United States shall in a judicial exposition of the act of July 28, 1866, have declared that such action was illegal.

When an officer is commissioned into the Army, he has, without doubt, under the present law, a right to promotion to vacancies occurring in the next immediate consecutive grades above him—grades *existing at the time of his original entry into the service* (except in case of disability or other incompetency). This is incident to his original appointment which is initiated by the President; *but he does not become possessed of an inchoate right to fill an office thereafter to be created.*

It is claimed that inasmuch as the act of 1866 provides that the new captains in the Quartermaster's Department shall be selected from the former assistant quartermasters of volunteers, while no such provision is made respecting colonels, lieutenant-colonels, or majors, it follows that Congress intended that the latter should be promoted from incumbents of the old offices. But this view your committee believes erroneous; *it is in conflict with the whole policy of the government in the matter of appointments to the new offices under this act in the various corps and in the line of the Army, and in conflict with the policy of the government under all other similar acts.* In every organic act relating to the Army which created new offices it has been uniformly held by the War Department, whose duty it was to construe it, that the organization under the act was not established until the offices created by the act were all filled, and that the regulation governing *promotions* above cited only became operative *after the organization was so established.*

The language of the Regulation is, "all vacancies in *established* regiments and corps to the rank of colonel shall be filled by *promotion* according to seniority," &c. *Promotion* as used in this regulation means advancement according to precedence by date of commission to all vacancies happening by death, resignation, retirement, dismissal, and desertion

of an incumbent, in established regiments, corps, or arms of service. *Appointment* as applied to military officers means any *original* entry into a commissioned office, or subsequent advancement by *selection*.

The distinction between *appointment* and *promotion* was clearly made in the nominations sent to the Senate June 2, 1790, and March 3, 1791, and has ever since been recognized.

In 1778, Congress gave an expression of its judgment on the subject of *promotions* only by recommending "to the several States to provide that in all future *promotions* officers rise regimentally to the rank of captain, and thence in the line of the State to the rank of colonel, except in cases where preference may be given on account of *distinguished merit*."

The Army of the United States was created by the resolution of Congress of March 3, 1787, adopting the forces then in the service of the several States.

The act of April 30, 1790, entitled "An act for regulating the military establishment of the United States," repealed all prior laws in regard to the Army. Under this act all incumbents of offices in the old military establishment were renominated to the Senate. The additional officers required for the battalion added by the act were likewise nominated under the head of "*new appointments*."

In the nominations made March 3 and 4, 1791, appear quite a number of *appointments* and *promotions*, because a new regiment had been added. Your committee find the established rule in the War Department, since the creation of an army, has been to appoint officers by selection to newly-created offices or original vacancies, unless otherwise provided in the act, and to promote officers according to seniority to the rank of colonel in the several corps throughout the Army.

Adjutant-General Townsend, in a report made to the Secretary of War, under date of January 2, 1878, says:

There is no such thing as regular promotion to an original vacancy. Promotion has in the military service a technical signification. It indicates the advancement of an officer to a higher grade in place of one by whom the grade has been vacated. It often happens, as recently in the Engineer and Ordnance Corps, that original vacancies are filled by the appointment of officers in the order of their rank; still, this is as much a selection by the President as if he had appointed the officers to fill these vacancies without regard to their relative rank.

Quartermaster-General Meigs, in a letter, under date of January 8, 1878, says:

It is not for me to criticise the legislation of Congress, but I venture to say that the scheme of reorganization of this department at the close of the war, by which some of those who had rendered the most valuable service were placed in high positions, and some of those volunteers who had rendered like service were advanced, had my full concurrence and approbation; and that I have never doubted that, as suggested by myself and approved by so eminent a lawyer as the Hon. E. M. Stanton, then Secretary of War, it was actually in accordance with the law and with justice.

General Grant, in referring to the appointments made by selection to fill the original vacancies in the Quartermaster's Department created by the act of 1866, says:

I believe they were made in strict accordance with law.

The act of June 18, 1846, created two original vacancies in the grade of assistant adjutant-general, which were filled by the appointment of Captains McCall and Bliss, without regard to seniority.

The act of July 17, 1862, provided that there should be added a cer-

tain number of offices to the Adjutant-General's Department by "regular promotion of its present officers."

These were made in accordance with the express provision of that act.

The act of August 3, 1861, created five inspector-generals, with the rank of major. These original vacancies were filled by officers of the Adjutant-General's Department, Quartermaster's Department, cavalry, artillery, and infantry. The act of August 6, 1861, added two inspector-generals, with the rank of colonel, which were filled by the appointment of Major and Paymaster R. B. Marcy, the present chief of that department, and Henry Van Rensselaer, a citizen of New York.

By the act of February 11, 1847, a certain number of original vacancies were created in the Quartermaster's Department, one of which was filled by the appointment, with rank of major, of Henry Smith, of Michigan, a citizen of Michigan. The act of July 28, 1866, added one colonel to the Pay Department, which was filled by the appointment to the new office of the junior lieutenant colonel, Nathan W. Brown.

The act of August 3, 1861, created one additional colonel and lieutenant colonel in the Ordnance Department; the grade of colonel was filled by the senior major, John Symington; the lieutenant colonel by the next senior major, George D. Ramsay. The act of March 3, 1855, created the 1st and 2d regiments of cavalry (now 4th and 5th); the original vacancies were filled by selection from the staff and line of the army, without regard to seniority; it also created the 9th and 10th regiments of infantry, the original vacancies in which were filled in the same manner as in the 1st and 2d cavalry.

By the act of July 29, 1861, there were added to the Army one regiment of cavalry, one of artillery, and nine (three battalions) of infantry; the vacancies in each of them were filled by selection from the staff and line of the Army, without regard to seniority, and by appointments from the volunteer force and civil life.

By the act of July 17, 1862, two additional companies were added to the 5th regiment of cavalry. The act provided that the vacancies thus created were not to be considered original vacancies, but to be filled by regular promotion of the officers of the cavalry arm of the service.

Under the act of July 28, 1866, additional majors were added to the artillery regiments, and the vacancies thus created were filled, without regard to seniority; by Captains Gibson, Tedball, and Morgan. Under the same act two new companies were added to each of the twenty-seven regiments of infantry *then in the service*. The appointments from the Regular Army were made without regard to seniority, and a certain number from the volunteers and those who had become citizens. Under the same act (July 28, 1866,) the Medical Department was increased. Major Crane was appointed to fill an original vacancy in the grade of colonel. Majors McDougall, Abadie, Murray, Sutherland, and Baxter (from the volunteers) to lieutenant colonel, without regard to seniority. The same act created new offices in the Pay Department, which were filled in a similar manner.

Under the law of July 28, 1866, there were 837 appointments made to fill original vacancies or new offices in the line and staff of the Army. There were 202 appointed from the Army, 586 from the volunteers, and 49 from civil life. There were 41 appointments to the rank of colonel; 26 from the Regular Army, 15 from the volunteers and civil life. There were 48 appointments to the rank of lieutenant colonel; 30 from the Regular Army, 18 from the volunteers and civil life. There were 80

appointments to the rank of major; 29 from the Regular Army and 51 from volunteers and civil life.

The records of the War Department are conclusive, and your committee believe should forever set at rest the agitations for increased rank in the Quartermaster's Department. The cases above stated are analogous to those appointed to fill original vacancies in the Quartermaster's Department. They show that in old regiments and in the staff corps, when no reorganization was contemplated, the appointments to new offices were made by selection, even citizens—men from civil life—have been appointed to all grades in the service.

The following letter from Hon. George W. McCrary, Secretary of War, in reply to one sent to the War Department, confirms your committee in their conclusions on this subject:

WAR DEPARTMENT,
December 11, 1879.

SIR: In reply to your letter of the 25th of June last, referring to copy of Senate bill 192, to correct date of commission of certain officers of the Quartermaster's Department; also, a copy of memorial of Col. Rufus Ingalls, and other officers of the Quartermaster's Department, remonstrating against the passage of the bill, I have the honor to state for your information *that the original vacancies in the Quartermaster's Department, created by the act of July 28, 1866, were filled by selection from among officers who had rendered meritorious services during the war, and that similar appointments by selection were made in the line, as well as the staff of the Army, in accordance with the long-established rule of this department of filling new offices created, as shown by the report of the Adjutant-General of January 2, 1878, and the accompanying report of that officer, dated the 3d instant.*

I believe it would be inimical to the interests of the Army to have these bills become a law. This question has been long settled and should not be revived.

The inclosures to your letter are herewith returned.

Very respectfully, your obedient servant,

GEO. W. MCCRARY,
Secretary of War.

HON. JOHN A. LOGAN,
Committee on Military Affairs, United States Senate.

These appointments were made fourteen years ago, and Congress has since that time steadily refused, though constantly implored, to disturb the deliberate action of the appointing power in the matter.

This brings this case within the rule laid down by the Supreme Court in *United States vs. Alexander*, 12 Wall., 181, that "the long standing construction of an act by the department whose duty it was to act under it will *not* be disturbed."

It has been stated that the cases of Col. Nelson H. Davis and Lieut. Col. Absalom Baird, of the Inspector General's Department, are governed by the same principle as appointments in the Quartermaster's Department. Major Davis was entitled to the vacancy in the grade of colonel in the Inspector General's Department, caused by the death of Col. Van Rensselaer, in March, 1864. Major Hardie was appointed to the place from the Adjutant-General's Department. Major Davis was justly righted by the act of June 8, 1872. Major Baird then claimed the rank of lieutenant-colonel, which he would have received but for the appointment of Hardie, and it was granted by the act of June 16, 1874. We find they have no bearing on the present controversy, for neither were new offices but *accidental vacancies* created by death or promotion of an incumbent to a higher grade.

If the argument be allowed that any appointments made since 1857, contrary to the terms of the regulations of that year and 1863, are illegal, the appointments of Generals Grant, McClellan, Halleck, Fremont, Rosencrans, Hooker, Howard, Terry, and Rousseau were illegal; for

they were all appointed contrary to par. 21, of these regulations which is as follows :

Appointments to the rank of brigadier-general and major-general will be made by selection from the Army.

Your committee concur in the views expressed by the Military Committee of the Forty-fifth Congress, that the opinion of the Attorney-General of January 15, 1872, was evidently prepared without much consideration, and is of no weight or force. Where is this principle of antedating rank to end? It cannot stop with the staff corps but must include the line as well. When is it to end in the Quartermaster's Department? Your committee believe it will not stop with the present colonels and lieutenant-colonels in that department. The majors in the corps as soon as they reached the rank of lieutenant-colonel would ask Congress to place them over Tompkins and Ekin, because they ranked the officers mentioned as captain before the reorganization of the Army. As an evidence of the fact that numberless claims of this kind would be presented, should either of the bills become a law, your committee refer to the amendment intended to be proposed by Mr. Garland to Senate bill 192, now under consideration by your committee, to correct the date of commission of certain officers of the Quartermaster's Department, by changing the dates of commission of Majors Card, Reynolds, Dandy, Weeks, Hughes, Robinson, Baker, and Lee, to the 18th day of January, 1867, an average gain in date of rank to each officer of *more than nine years*. As the above-named officers ranked Batchelder, Ludington, and Moore, before the reorganization of the Army, the latter officers would be returned to the places on the register at the foot of the list of officers of their grade where they stood when appointed in 1867. Captains when appointed majors would make similar claims, and in the case of Major Ludington, appointed direct from the volunteers, he would be passed over for an indefinite period, as he was not in the regular establishment of the Quartermaster's Department until appointed major in 1867. As an illustration: *Majors Robinson, Baker, and Lee, the last only confirmed by the Senate during the present month; the first two, within a year, now ask Congress to antedate their rank to January 18, 1867, by which they will gain more than twelve years of rank, and make them eligible to promotion in advance of many officers of the rank of major appointed to original vacancies under the act of July 28, 1866. This process of antedating rank would make the lieutenant-colonels and many of the majors appointed under the above act the junior officers of their grade, and destroy all their hope of promotion. It having taken them thirteen and fourteen years to reach their present positions in their grades, the same time would probably elapse before they would be again advanced to those positions; a loss of 26 and 28 years, or more than a quarter of a century of the life of each officer to be ignored. How then can it be said that not only is no injustice done to any one, but the proposed legislation simply rearranges the list of colonels and lieutenant-colonels in the Quartermaster's Department without the displacement of any one?*

The following statement shows the present rank of the officers in their respective grades who would be affected by these bills should either of them become a law, and their rank in their grades under said bills, viz:

List of colonels and lieutenant-colonels in the Quartermaster's Department as they now appear on the Register, 1879 :

COLONELS.

1. Rucker.
2. Ingalls.
3. Easton.
4. Van Vliet.

LIEUTENANT-COLONELS.

1. Holabird.
2. Tompkins.
3. Ekin.
4. Saxton.
5. Bingham.
6. Perry.
7. Hodges.

List of colonels and lieutenant-colonels in the Quartermaster's Department as they would be under this bill :

COLONELS.

1. Easton.
2. Van Vliet.
3. Rucker.
4. Ingalls.

LIEUTENANT-COLONELS.

1. Saxton.
2. Holabird.
3. Bingham.
4. Perry.
5. Hodges.
6. Tompkins.
7. Ekin.

NOTE.—Of these officers, Rucker, Holabird, Tompkins, and Ekin were appointed to fill *original vacancies* in their present grades. Ingalls was appointed to fill an *original vacancy* in the grade of lieutenant-colonel, and afterwards promoted by seniority to his present grade of colonel.

List of majors in the Quartermaster's Department as they appear on the Army Register, 1879 :

MAJORS.

1. Chandler.
2. Myers.
3. Sawtelle.
4. Dana.
5. Potter.
6. Batchelder.
7. Ludington.
8. Moore.
9. Belger.
10. Card.
11. Reynolds.
12. Dandy.
13. Weeks.
14. Hughes.

List of majors in the Quartermaster's Department as they would rank under the amendment to be proposed by Mr. Garland to Senate bill 192 :

MAJORS.

1. Chandler.
2. Myers.
3. Sawtelle.
4. Dana.
5. Belger.
6. Card.
7. Potter.
8. Reynolds.
9. Dandy.
10. Weeks.
11. Hughes.
12. Batchelder.
13. Ludington.
14. Moore.

NOTE.—Since the Army Register of 1879 was published, Major Chandler has been promoted to the rank of lieutenant-colonel, and two majors retired, making three vacancies in that grade, to which Robinson, Baker, and Lee were recently appointed.

Names.	Present date of commission.	Date of rank to be conferred by amendment proposed.	Gain in date of rank in their present grades by proposed amendment.		
			Years.	Months.	Days.
MAJORS.					
Card	June 6, 1872	Jan. 18, 1867	5	4	18
Reynolds	Mar. 3, 1875	Jan. 18, 1867	8	1	15
Dandy	Mar. 3, 1875	Jan. 18, 1867	8	1	15
Weeks	May 29, 1876	Jan. 18, 1867	9	4	11
Hughes	May 29, 1876	Jan. 18, 1867	9	4	11
Robinson	Mar. 4, 1879	Jan. 18, 1867	12	1	16
Baker	Apr. 21, 1879	Jan. 18, 1867	12	3	3
Lee	July 29, 1879	Jan. 18, 1867	12	6	11

An average gain of more than nine years and seven months to each officer in date of rank.

Had the appointments been made under the rule claimed by these officers, they could not have received the date of rank in their present grades that will be conferred by either bill, should it become a law, as the following table, prepared from the data furnished by the Adjutant-General of the Army in his report dated January 2, 1878, on the petition of Colonels Easton *et al.*, addressed to the Senate Committee on Military Affairs, will show :

Name and present date of commission.	Date of rank in present grade these officers would have received under act of July 28, 1866, had the vacancies been filled by seniority.	Date of rank in present grade to be conferred by the pending bill.	Gain in date of rank in present grade by pending bill over what they would have received under their own construction of the act of July 28, 1866.		
			Years.	Months.	Days.
Easton, June 6, 1872	Feb. 22, 1869	July 28, 1866	2	6	25
Van Vliet, June 6, 1872	Feb. 22, 1869	July 28, 1866	2	6	25
Saxton, June 6, 1872	Feb. 22, 1869	July 29, 1866	2	6	24
Bingham, March 3, 1875	Mar. 3, 1875	July 29, 1866	8	7	5
Perry, March 3, 1875	Mar. 3, 1875	July 29, 1866	8	7	5
Hodges, May 29, 1876	May 29, 1876	July 29, 1866	9	10

NOTE 1.—After the date of these officers is thus fixed by the bill on the same day as the colonels and lieutenant-colonels filling original vacancies, then by virtue of their old rank of a previous date (prior to the reorganization of the Army) as provided by paragraph 5, Revised United States Army Regulation, 1863, the officers named in the bill will be placed above petitioners of same grade in the order named in preceding statement.

NOTE 2.—In the statement published at page 5, Senate Report No. 293, Forty-fifth Congress, second session, Moore and Montgomery were left out of the calculation. Counting them in with the others in the estimated dates of promotion, the figures would be changed as indicated in this table.

From this it will be seen that the demands of these officers are far greater than they would be entitled to under their own construction of the law.

They now ask Congress to *give them a place on the Roster which all the authorities did not and could not give in 1866. This fact should not be overlooked, for it destroys the basis of the claim of those named in the bills.* These remarks apply also to the majors in the corps.

The proviso in the bills that "no officer in said department shall, by this act, be reduced from his present rank, nor shall any additional pay or allowance be made to any officer by virtue of this act," is apt to create an erroneous impression.

These officers cannot be advanced in their rank in their grades without the displacement of those officers who now hold the rank in the grade to which they aspire. It cannot be accomplished without it is taken from the one and conferred upon the other.

The demand of the promoters of these bills has been before Congress more than ten years. The Military Committee of both Houses having reported adversely to these demands, all parties in interest, either in person or by their brother officers consented to the act of June 3, 1872 (17 Stats., 214), as a compromise measure. Believing this would forever dispose of the question Congress enacted it because all parties conceded it to be a final settlement of the matter. So far from abiding by this act the promoters of these bills have distorted it into a concession of the right of their demands by Congress; not satisfied with the generous indulgence already granted them (which was subsequent to the decision

of the Attorney-General of January 3, 1872), they again ask Congress to antedate their commissions.

These claimants, your committee believe, might with equal modesty solicit Congress to change the dates of commissions to January 1, 1880, of every officer appointed to new offices in the Quartermaster's Department under the act of 1866.

This method would indicate their object to be placed over their brother officers and thus obtain promotion first. By antedating their rank the same thing is accomplished in an apparently harmless manner, so far as other officers are concerned.

Your committee invite attention to the fact that Easton and Van Vliet have already reached the highest grade to which they can be promoted, and cannot in any manner be benefited by the legislation sought.

The act referred to reads as follows :

AN ACT to authorize the appointment of certain officers in the Quartermaster's Department.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled : That the President be, and is hereby, authorized to nominate, and by and with the consent of the Senate, to appoint, certain officers of the Quartermaster's Department to the grade they would have held in said Department, respectively, had the vacancies created therein by the act of July twenty-eighth, eighteen hundred and sixty-six, from the rank of major to the rank of colonel, inclusive, been filled by promotion by seniority : *Provided, That no officer shall be deprived of his relative rank, or reduced from his present grade by this act, and that the officers whose appointment are herein authorized shall take rank and receive pay only from the date of their confirmation.*

It is thus seen that Congress has already passed an "Act to correct the Register," for these officers, but in that act a proviso was put in to prevent injustice to others who had been appointed to fill original vacancies.

The same demands made by these parties your committee find, might with equal force be made by officers of every other corps and arm of the service, but no such demands are known to have ever been presented to Congress for the principle on which it is based, if admissible, must apply not only to the Quartermaster's Department but to the whole Army and will go far to disorganize it.

The effect, if either of these bills with the proposed amendment should become a law, would be to reduce in their grades, and consequently rank, officers appointed to fill new offices in the Quartermaster's Department created as a reward for zeal and efficiency displayed during a great war—a punishment inflicted by courts-martial for serious offenses against military law. It would degrade and humiliate these officers who have been slowly advancing in the same rank to which they were appointed in 1866-'67, and your committee believe the precedent established would be fatal to the interests of the Army, destructive to its efficiency, injurious to its morale, and unjust to those appointed to the new offices in the Quartermaster's Department under the act of July, 1866, upon a construction of the regulations which has always prevailed and now prevails in the War Department.

We have enumerated the large number of officers rewarded by the government for their zeal and ability shown in the several departments and in all arms of the service during a protracted war, and are convinced that the act under which they were appointed, approved by the President who made the nominations, and the Senate that confirmed them, was intended to bestow on regular and volunteer officers, without regard to corps, or arms of the service, such rewards as the commander-in-chief of the Army believed they justly earned. These bills (195, 577) propose after the lapse of fourteen years to ignore the meritorious ser-

vices of officers thus appointed in the Quartermaster's Department, and to punish and disgrace them for having been so rewarded.

It would seem to your committee that considerations of regard for the well-considered action of the President and Senate in this matter ought to forbid these officers from such unseemly persistence in a demand so unworthy.

This kind of legislation should not be encouraged. It is subversive of all confidence in the government; it takes from the minds of the people, and especially officers of the Army, all idea of stability in law. It puts private property and vested rights in jeopardy; it lowers, unsettles, and abases the standard of right and justice, and lessens the security of all. For these reasons your committee report adversely to the said bills and the proposed amendment, and recommend that said bills and amendment do not pass.

The report of the Adjutant-General of the Army is hereto appended:

REPORT UPON PETITION OF COLONEL EASTON ET AL. FOR DIFFERENT DATE OF RANK.

WAR DEPARTMENT, ADJUTANT-GENERAL'S OFFICE,

January 2, 1878.

The act of July 23, 1866, created a certain number of *original vacancies*—new offices—of colonel, lieutenant-colonel, &c., in the Quartermaster's Department, and did not specify how these vacancies were to be filled, except in the grade of captain and assistant quartermaster. The President held that the laws and rules with regard to promotions gave him the right to fill these original vacancies *by selection*, and they, by appointment, were so filled.

It has been, and is, claimed by certain officers concerned, that the law of *promotion* applied to the filling of these vacancies, and that the action of the President and Senate was illegal, and deprived them of their just and legal right—to be *promoted* to these original vacancies. The appointments were, with perhaps very few exceptions, made in accordance with the recommendation of the Quartermaster-General.

The questions involved were reported on by the Adjutant-General, in 1868, in the case of Maj. Alexander Montgomery, quartermaster, as follows:

His (Major Montgomery's) claim to the rank of *colonel* is based upon the assumption that the vacancies created in the grades of colonel (three) and lieutenant-colonel (six) by the act of July 23, 1866, should have been filled by *regular promotion*, and not by *selection*; and cites the act of July 5, 1833, section 9, providing that promotion in said department (Quartermaster's Department) shall take place as in regiments and corps, viz: by seniority, up to the grade of colonel. He adds: "This law was grossly violated in the promotions recently made to the vacancies created by the late act *increasing* (not reorganizing) the Quartermaster's Department, * * * leaving him a major after thirty-two years' service."

To understand the effect of this provision in the act of July, 1833, it is necessary to say that, prior to its passage, there were but five officers in the Quartermaster's Department—one brigadier-general and four majors. Up to that time, therefore, there could be *no promotion* in the corps. This act, after authorizing the President to appoint *two* assistant quartermasters-general with rank of colonel, and *two* deputy assistant quartermasters-general with rank of lieutenant-colonel, and *eight* assistant quartermasters with rank of captain—that is, after authorizing all the different grades in the Quartermaster's Department, directed that, when these vacancies were filled, promotions to vacancies caused by casualties should be filled as in regiments and corps.

This act did not direct the President to fill the new vacancies of colonel and lieutenant-colonel from the grade of major. He did so, however, as a matter of justice, there being no reasons why those four majors should not be selected for the new and higher grades. The original vacancies created in the Quartermaster's Department by the act of August 3, 1861—viz: one *colonel* and two *lieutenant-colonels*—were *not*, as stated by Major Montgomery, filled by selecting officers of the Quartermaster's Department in the order of rank. As in 1833, the President, so far as the services of the officers entitled them to preference, appointed them in the order of their rank, but he omitted to appoint Major Osborn Cross, and selected two officers junior to him to fill the vacancies of lieutenant-colonel.

There is no such thing as *regular promotion to an original vacancy*. Promotion has, in the military service, a technical signification. It indicates the advancement of an officer to a higher grade in place of one by whom the grade has been vacated. It often happens, as recently in the Engineer and Ordnance Corps, that original vacancies are filled by the appointment of officers in the order of their rank; still, this is as much a selection by the President as if he had appointed the officers to fill these vacancies without regard to their relative rank.

The subject of the matter in which original vacancies should be filled has been very often discussed, and the decisions have invariably been (and it has become the established principle of the department) that, unless otherwise provided by law, the President has the *authority* to fill these vacancies by selection. * * *

Major Montgomery, near the close of his claim, states: "The promotion of the officers over me was in direct violation of the late law, July 28, 1866, increasing the Quartermaster's Department, which provides *especially* that the appointments to the rank of captain shall be made by *selection*, manifestly implying, according to every rule of construction, that the appointments in other grades (colonel and lieutenant-colonel) *should not be made so*," &c. Major Montgomery, to carry out his rule of construction, fails, however, to show how the vacancies in the grade of captain *could* be filled in any other way than that of selection, for there are no first lieutenants in the Quartermaster's Department who could be promoted.

What the law did provide was, "that the vacancies hereby created in the grade of assistant quartermaster shall be filled by selection from among the persons who have rendered meritorious services as assistant quartermasters of volunteers during two years of the war." * * *

January 11, 1872, the Hon. Henry Wilson requested the Secretary of war to refer to the Attorney-General, for opinion, the memorial of the officers who claimed they had been illegally deprived of promotion, and it was so referred January 12, 1872. The opinion of the Attorney-General, dated January 22, 1872, sustained the views of the officers as presented in their memorial. January 26, 1872, the Secretary of War directed preparation of nominations to be submitted to the Senate, putting all the officers claiming promotion in the places they would have occupied had the vacancies created by the act of July 28, 1866, been filled in conformity with the laws of promotion. Nominations were accordingly prepared, embracing the names of *all* officers who would have been affected had the appointments been made by seniority immediately after passage of the act. This list of nominations embraced the names of officers out of service, deceased, &c., with note explaining that the names were inserted for the purpose of making a correct record as to dates, &c. The nomination-book does not show whether or not the nominations were actually sent to the Senate by the President, nor if so sent, what action the Senate took on them. But under date of February 5, 1872, the Attorney-General wrote to the Secretary of War that he was informed by General Saxton that the Senate Military Committee had unanimously decided that the act of July 28, 1866, did not apply to the "cases now before the Senate," in view of the act of March 3, 1869, prohibiting appointments and promotions in the Quartermaster's Department. The Attorney-General further stated that the act of March 3, 1869, was not referred to in the memorial of the quartermaster officers, and that he did not consider that law in his opinion, but only construed the act of July 28, 1866; and while he adhered to his opinion as to the construction of that act, he held that, under the act of March 3, 1869, the President and Senate had no power to fill the vacancies in the Quartermaster's Department. (This supplemental statement of the Attorney-General would serve to prevent any favorable action on the strength of his opinion of January 22, 1872, so long as the act of March 3, 1869, remained in force.)

By an act of Congress approved June 3, 1872, the President was authorized "to appoint certain officers of the Quartermaster's Department to the grade they would have held in said department, respectively, had the vacancies created therein by the act of July 28, 1866, from the rank of major to the rank of colonel, both inclusive, been filled by promotion by seniority: *Provided*, That no officers shall be 'reduced in relative rank,' &c., and that the officers whose appointments are herein authorized shall take rank and receive pay only from the date of their confirmation."

Under this act Easton, Van Vliet, Montgomery, Moore, Ransom, Eddy, Saxton, Myers, Enos, and Card were nominated June 4 (confirmed June 6) to the *grades* they would have held had the vacancies made July 28, 1866, been filled by seniority; but with *rank* and pay from June 6, 1872.

By an act approved June 20, 1874 (General Orders 67, of 1874), the President was authorized to "nominate and promote William Myers to be major and quartermaster, to date from January 18, 1867" (the date he would have received had the vacancies of July 28, 1866, been filled by seniority).

Van Vliet, Bingham, Perry, and Hodges now claim a *date of rank* (which they would not have received had all the vacancies under act of July 28, 1866, been filled by seniority) which will put them on the register in the places they would have occupied under the act of July 28, 1866.

Name, rank, and date of commission, Quartermaster's Department.	Date of rank in present grade the officers would have received under act July 28, 1866.	Date claimed in memorial to Congress.
QUARTERMASTER-GENERAL.		
Brigadier-general Meigs, Montgomery C., 15 May, 1861.		
ASSISTANT QUARTERMASTERS-GENERAL:		
<i>Colonels.</i>		
Allen, Robert, 28 July, 1866.		
Rucker, Daniel H., 28 July.		
Ingalls, Rufus, 29 July.		
Easton, Langdon C., 6 June, 1872.	February 22, 1869.	July 29, 1866.
Van Vliet, Stewart, 6 June.	February 22, 1869.	July 29, 1866.
DEPUTY QUARTERMASTERS-GENERAL.		
<i>Lieutenant-Colonel.</i>		
Holabird, Samuel B., 29 July, 1866.		
Tompkins, Charles H., 29 July.		
Ekin, James A., 29 July.		
Saxton, Rufus, 6 June, 1872.	February 22, 1869.	July 29, 1866.
Bingham, Judson D., 3 March, 1875.	March 3, 1875.	July 29, 1866.
Perry, Alexander J., 3 March.	March 3, 1875.	July 29, 1866.
Hodges, Henry C., 29 May, 1876.	May 29, 1876.	July 29, 1866.
QUARTERMASTERS.		
<i>Majors.</i>		
Chandler, John G., 18 January, 1867.		
Myers, William, 18 January.		
Sawtelle, Charles G., 18 January.		
Dana, James J., 18 January.		
Potter, Joseph A., 18 January.		
Batchelder, R. N., 18 January.		
Ludington, M. L., 18 January.		

NOTE.—In the statement furnished the Military Committee of the Senate, Montgomery and Moore were left out of the calculation. Counting them in with the others in the estimated dates of promotion, the figures would be changed as indicated in this list.

It may be added that the opinion of the Attorney-General referred to has always been by this office viewed as defective and antagonistic to the laws and rules in regard to promotion, as follows:

* * * * *

The law relative to promotions:

1. The act of June 26, 1812, section 5, provides that "from and after the passing of this act, the promotions shall be made through the lines of artillerists, light artillery, dragoons, riflemen, and infantry, respectively, according to established rule."

2. The act of March 30, 1814, "That from and after the passing of this act, promotions may be through the whole Army, in its several lines of light artillery, light dragoons, artillery, infantry, and riflemen, respectively, and that the relative rank of officers of the same grade, belonging to regiments or corps already authorized, or which which may be engaged to serve for five years or during the war, be equalized and settled by the War Department, agreeably to established rules; and that so much of the act entitled 'An act for the more perfect organization of the Army of the United States,' passed the 26th of June, 1812, as comes within the purview and meaning of this act, be, and the same is hereby, repealed."

3. By the foregoing acts the executive regulation in force at their passage relative to Army promotions was thereafter to be the law on that subject. The following was the regulation in question:

"Rules with regard to promotions:

"Original vacancies will be supplied by selection, accidental vacancies by seniority, except in extraordinary cases. (Disability or incompetency of the senior officer.)

"Promotions to the rank of captain will be made regimentally, to that of field appointments by line; the light artillery, dragoon, artillery, infantry, riflemen, being kept always distinct."

4. The 5th section of the act of March 3, 1813, "for the better organization of the general staff," &c. (Military Law, p. 165), required the Secretary of War to prepare a system of general regulations, which, "when approved by the President of the United

States, shall be respected and obeyed, until altered or revoked by same authority; and the said general regulations thus prepared and approved, shall be laid before Congress at its next session." The regulations prepared pursuant to this law were approved by the President May 1, 1813.

5. The 9th section of the act for organizing the general staff, &c., approved April 24, 1816 (Military Law, p. 189), provides "that the regulations in force before the reduction of the Army be recognized, as far as the same shall be found applicable to the service, subject, however, to such alterations as the Secretary of War may adopt, with the approbation of the President."

6. The regulations "revised conformably to the act of 24th April, 1816," were promulgated by the War Department September, 1816, and no change whatever was made in the "rules with regard to promotion" as above quoted. Those rules, indeed, so far as regimental officers are concerned, have never been altered from their adoption to the present time. (See the different editions of the general regulations, viz, 1821, 1825, 1835, 1841, 1847, 1857, 1863.)

7. Such was the law and usage in respect to Army promotions till the passage of the act of March 3, 1851, to which is attached a proviso in the following terms: "That all promotions in the staff departments or corps shall be made as in other corps of the Army." This act, it will be observed, affirms the existence of a law regulating promotions in certain corps of the Army, and declares that the same law which has previously governed a part should in future be applicable to the entire military establishment.

In regard to paragraph 19, article 4, of the Revised Army Regulations of 1863, the Attorney-General seems not to have distinguished between an "established" corps and one in the process of establishment.

The act of July 28, 1866, section 13, enacted that *hereafter* the Quartermaster's Department of the Army shall consist of, &c., and under that enactment the former Quartermaster's Department, as to certain new offices, disestablished and did not again become an "established" corps or department until after the rules of promotion had been complied with—that is to say, not until the "original vacancies" created by section 13 of the act of July 28, 1866, had been "supplied by selection." Of course the original vacancies having once been filled, the department stood as "established," and thereafter subject to the requirements of paragraph 19, but not before.

E. D. TOWNSEND,
Adjutant-General.

HEADQUARTERS OF THE ARMY,
ADJUTANT-GENERAL'S OFFICE,
January 19, 1878.

Hon. B. WADLEIGH,
United States Senate:

SIR: Referring to your letter of the 17th instant, stating that by reference to the Army Register of 1866 it appears that if the rule of promotion by seniority had obtained, the colonels appointed under the act of July 28, 1866, would have been Swords, Clary, Miller, Montgomery, Allen, and Donaldson, and that Easton would have been the senior lieutenant-colonel and Saxton the senior major, and that neither could have been promoted until the passage of the act of March 3, 1875, and asking if that statement is correct, I have the honor to inform you that had the appointments to the original vacancies been made by seniority, and had all the appointments and promotions, including Montgomery's, been confirmed by the Senate, the roster of colonels, &c., as it would have stood on the 29th of July, 1866, the date on which a number of colonels were retired, is correctly stated above. In the report of this office, to which you refer, Montgomery, whose subsequent nomination for promotion for lieutenant-colonel was rejected by the Senate, was not included among the officers who would have been promoted up to the grade of colonel under the act.

Under the view that the rejection of Montgomery's promotion should not be taken into consideration, the roster as given in the report of this office would be changed to show that Easton (senior lieutenant-colonel, July 29, 1866) and Saxton (senior major, July 29, 1866) would not have obtained the rank of colonel and lieutenant-colonel respectively until February 22, 1869, and that Bingham and Perry could not have the rank of lieutenant-colonel prior to the act of March 3, 1869.

I am, very respectfully, your obedient servant,

E. D. TOWNSEND,
Adjutant-General.

NOTE.—The above was printed from copies of the originals furnished by the Adjutant-General of the Army.

[To accompany report of Committee on Military Affairs on Senate bill 192.]

Letter of the Quartermaster-General.

WAR DEPARTMENT,
QUARTERMASTER-GENERAL'S OFFICE,
Washington, D. C., February 26, 1880.

Col. S. B. HOLABIRD,

Deputy Quartermaster-General, U. S. A., Washington, D. C.:

COLONEL: I have received your note of the 18th instant in relation to the question as to certain appointments and promotions made in July, 1866, under the then recent law reorganizing the Quartermaster's Department.

This law was passed by Congress at the close of a great war, in which many officers, comrades in the old Army, had by fortune of war and merit of their own been able to render distinguished service.

It is too late now justly to quarrel with the official acts of the then Executive, the Secretary of War, the military authorities, and the Senate, all of whom had witnessed and borne their parts in that life-struggle of the nation.

These all united and agreed in reorganizing and establishing the new corps of the Quartermaster's Department upon a peace footing, in filling original vacancies created by the act by selection, so as to recognize and reward services which these highest authorities believed to deserve such recognition and reward, and also to organize the newly-established corps so as to make it as efficient and strong as was possible under the law for the performance of its duties, known then to all men to have been of high importance to the country during the previous five years, and believed to be of continuing importance to its welfare and to its safety.

The uniform custom of the government, so long as I have had knowledge of it, has been to consider that the President had, as his prerogative, the right and power to nominate and, with consent of the Senate, to appoint by selection, not only from the Army list, but from civil life, to fill all original vacancies.

New offices of colonel, lieutenant-colonel, major, and captain, created in the Army by the then recent law, were, according to all precedent, all previous rulings, original vacancies.

The Secretary of War and the Quartermaster-General held all such vacancies thus created in the Quartermaster's Department to be original vacancies, and they were filled by selection.

It is true this bore hardly upon some officers who had rendered service according to their opportunities, to their capacity, to their zeal; while others who, by good fortune, good opportunity, good health, youth, physical endurance, great or greater zeal, great or greater capacity, had been more distinguished, had been more useful to the country, were, as fitting reward, promoted above those who had been less successful, less distinguished.

If the Secretary of War, if the Executive, were wrong in their doctrine, it was for the Senate, also well versed in the history of the war, of its officers, and of legislation, to refuse to assent to these appoint-

ments and promotions; but the Senate confirmed them—advised and consented to them all.

From the time of receipt and acceptance of the commissions issued by the advice and consent of the Senate, the rights thereunder of the promoted or appointed officers have been vested rights, with all the sacredness of contract between the country and the officers, and these rights cannot justly now be taken away.

As well might hundreds of officers who find themselves overslaughed (as one of the letters which you communicated to me styles it) by Meade, by Thomas, by Burnside, by Sheridan, by Sherman, by Grant, now complain and ask that they, by special legislation, be placed on a par with these great soldiers, as may an officer of the Quartermaster's Department, promoted in the year 1866, now ask that his seniors be deprived of lawful promotion, and that it be given to him, the junior.

The argument has been made that the regulations of 1857 changed the custom of the Army in regard to original appointments, and this argument has deceived many. It appears to me to be sufficient answer to say that no President can be assumed to have knowingly and designedly signed away, by approving in bulk a volume of general regulations for the Army, his Constitutional rights and prerogative, and that, if even one was found so base as to attempt to do this, he could not by so doing affect or diminish by a hair's breadth the rights and powers of his successors in the executive office.

I do not believe that the President of the United States who allowed the general regulations of the Army of 1857 to be then promulgated knew or suspected that he would be considered to have abandoned an important part of those powers for the safety of the country, for the execution of the laws, which had been committed to his predecessor and to himself.

If such was the effect of the general regulations of 1857, then their issue constituted, it seems to me, a fraud upon the President who permitted it, void in fact and in law, as to the deluded President himself, and certainly without effect upon his successors.

I think that all special legislation in regard to this matter since 1866 has been based upon misunderstanding of the case, and that it has disturbed discipline, interfered with vested rights, and done great injustice, while it seems that it has not satisfied some of those who procured it.

I am, very respectfully, your obedient servant,

M. C. MEIGS,
Quartermaster-General, Brevet Major General, U. S. A.

A number of appointments to the rank of colonel, lieutenant-colonel, and major, without regard to seniority, made from the Regular Army, volunteers, and civil life, to fill new offices or original vacancies, under the law of July 28, 1866, viz:

APPOINTED TO THE RANK OF COLONEL.

Name.	Appointed from—	Appointed to—
Charles H. Crane	Surgeon, U. S. A., with rank of major.	Assistant surgeon-general.
Robert Allen	Quartermaster, U. S. A., with rank of major.	Assistant quartermaster-general.
James L. Donaldson	do	Do.
Daniel H. Rucker	do	Do.
Nathan W. Brown	Lieutenant-colonel, U. S. A.	Assistant paymaster-general.
Daniel McClure	Major and paymaster, U. S. A.	Do.
A. J. Smith	Lieutenant-colonel 5th Cavalry, U. S. A.	Colonel 7th Cavalry.
John I. Gregg	Captain 6th Cavalry, U. S. A.	Colonel 8th Cavalry.
Edward Hatch	Civil life (ex-volunteer)	Colonel 9th Cavalry.
Benjamin H. Grierson	do	Colonel 10th Cavalry.
George Stoneman	Lieutenant-colonel 3d Cavalry	Colonel 21st Infantry.
David S. Stanly	Major 5th Cavalry	Colonel 22d Infantry.
Jeff. C. Davis	Captain 1st Artillery	Colonel 23d Infantry.
Alvan C. Gillem	Captain and Assistant Quartermaster, U. S. A.	Colonel 24th Infantry.
Gordon Granger	Captain 3d Cavalry	Colonel 25th Infantry.
Joseph J. Reynolds	Major-general volunteers	Colonel 26th Infantry.
John E. Smith	Civil life (ex-volunteer)	Colonel 27th Infantry.
Charles H. Smith	do	Colonel 28th Infantry.
O. B. Wilcox	do	Colonel 29th Infantry.
J. D. Stevenson	do	Colonel 30th Infantry.
P. R. De Trobriand	do	Colonel 31st Infantry.
Thomas L. Crittenden	do	Colonel 32d Infantry.
Thomas H. Rnger	do	Colonel 33d Infantry.
G. Pennypacker	do	Colonel 34th Infantry.
Charles Griffin	Captain 5th Artillery	Colonel 35th Infantry.
John Gibbon	Captain 4th Artillery	Colonel 36th Infantry.
George W. Getty	Major 5th Artillery	Colonel 37th Infantry.
W. B. Hazen	Captain 8th Infantry	Colonel 38th Infantry.
Joseph A. Mower	Captain 1st Infantry	Colonel 39th Infantry.
Nelson A. Miles	Major-general volunteers	Colonel 40th Infantry.
R. S. Mackenzie	Captain Corps of Engineers	Colonel 41st Infantry.
Daniel E. Sickles	Major-general volunteers	Colonel 42d Infantry.
John C. Robinson	Major 2d Infantry	Colonel 43d Infantry.
Thomas G. Pitcher	Major 16th Infantry	Colonel 44th Infantry.
Wager Swayne	Major-general volunteers	Colonel 45th Infantry.

APPOINTED TO THE RANK OF LIEUTENANT-COLONEL.

Name.	Appointed from—	Appointed to—
Rufus Ingalls	Major and quartermaster, U. S. A.	Lieutenant-colonel and deputy quartermaster-general.
J. C. McFerran	do	Do.
S. B. Holabird	Captain and assistant quartermaster.	Do.
Charles H. Tompkins	do	Do.
James A. Ekin	do	Do.
E. H. Abadie	Surgeon, U. S. A., with rank of major.	Assistant medical purveyor.
Robert Murray	do	Do.
Charles Sutherland	do	Do.
George A. Custer	Captain 5th Cavalry	Lieutenant-colonel 7th Cavalry.
Thomas C. Devin	Civil life (ex-volunteer)	Lieutenant-colonel 8th Cavalry.
Wesley Merritt	Captain 2d Cavalry	Lieutenant-colonel 9th Cavalry.
Charles C. Walcutt	Civil life (ex-volunteer)	Lieutenant-colonel 10th Cavalry.
Louis D. Watkins	Captain 5th Cavalry	Lieutenant-colonel 20th Infantry.
S. S. Carroll	Captain 10th Infantry	Lieutenant-colonel 21st Infantry.
Elwell S. Otis	Civil life (ex-volunteer)	Lieutenant-colonel 22d Infantry.
George Crook	Major 3d Infantry	Lieutenant-colonel 23d Infantry.
Adelbert Ames	Captain 5th Artillery	Lieutenant-colonel 24th Infantry.
Emery Upton	do	Lieutenant-colonel 25th Infantry.
Alexander McD. McCook	Captain 3d Infantry	Lieutenant-colonel 26th Infantry.
Luther D. Bradley	Civil life (ex-volunteer)	Lieutenant-colonel 27th Infantry.
Romeyn B. Ayres	Captain 5th Artillery	Lieutenant-colonel 28th Infantry.
G. P. Buell	Civil life, (ex-volunteer)	Lieutenant-colonel 29th Infantry.
Joseph H. Potter	Major 37th Infantry	Lieutenant-colonel 30th Infantry.
R. W. Bowerman	Civil life (ex-volunteer)	Lieutenant-colonel 31st Infantry.
Ed. McGarry	do	Lieutenant-colonel 32d Infantry.
C. R. Woods	Major 27th Infantry	Lieutenant-colonel 33d Infantry.
A. V. Kautz	Captain 6th Cavalry	Lieutenant-colonel 34th Infantry.

APPOINTED TO THE RANK OF LIEUTENANT-COLONEL—Continued.

Name.	Appointed from—	Appointed to—
James H. Wilson	Captain of engineers	Lieutenant-colonel 35th Infantry.
Henry A. Morrow	Civil life (ex-volunteer)	Lieutenant-colonel 36th Infantry.
J. R. Brooke	do	Lieutenant-colonel 37th Infantry.
Cuvier Grover	Major 3d Infantry	Lieutenant-colonel 38th Infantry.
Frank Wheaton	Major 2d Cavalry	Lieutenant-colonel 39th Infantry.
E. W. Hinks	Civil life (ex-volunteer)	Lieutenant-colonel 40th Infantry.
W. R. Shafter	do	Lieutenant-colonel 41st Infantry.
John B. McIntosh	Captain 5th Cavalry	Lieutenant-colonel 42d Infantry.
Joseph B. Kiddoo	Colonel volunteers	Lieutenant-colonel 43d Infantry.
Alex. S. Webb	Captain 20th Infantry	Lieutenant-colonel 44th Infantry.
George A. Woodward	Civil life (ex-volunteer)	Lieutenant-colonel 45th Infantry.

APPOINTED TO RANK OF MAJOR.

Name.	Appointed from—	Appointed to—
John G. Chandler	Captain and assistant quartermaster, U. S. A.	Major and quartermaster.
Charles G. Sawtelle	do	Do.
James J. Dana	do	Do.
Joseph A. Potter	do	Do.
Richard N. Batchelder	do	Do.
M. I. Ludington	Captain and assistant quartermaster (volunteer).	Do.
James M. Moore	Captain and assistant quartermaster U. S. A.	Do.
H. G. Gibson	Captain artillery	Major artillery.
John C. Tidball	do	Do.
Charles H. Morgan	do	Do.
E. D. Judd	Civil life (ex-volunteer)	Paymaster.
Val. C. Hanna	do	Do.
William Smith	do	Do.
Wickliffe Cooper	do	Major 7th Cavalry.
Joel H. Elliott	do	Do.
William R. Price	Assistant adjutant-general volunteers	Major 8th Cavalry.
William Gamble	Civil life (ex-volunteer)	Do.
D. R. Clendenin	do	Do.
James F. Wade	Captain 6th Cavalry	Major 9th Cavalry.
A. J. Alexander	Captain 3d Cavalry	Do.
George A. Forsyth	Civil life (ex-volunteer)	Do.
A. P. Morrow	do	Do.
James W. Forsyth	Captain 36th Infantry	Major 10th Cavalry.
M. H. Kidd	Civil life (ex-volunteer)	Do.
John E. Yard	Captain 9th infantry	Do.
Henry C. Merriam	Civil life (ex-volunteer)	Major 38th Infantry.
Alexander Von Schrader	Second lieutenant 11th Infantry	Major 39th Infantry.
Charles E. Compton	Civil life (ex-volunteer)	Major 40th Infantry.
G. W. Schofield	do	Major 41st Infantry.
T. F. Rodenbough	Captain 2d Cavalry	Major 42d Infantry.
Martin D. Hardin	First Lieutenant 3d Artillery	Major 43d Infantry.
John R. Lewis	Colonel Veteran Reserve Corps	Major 44th Infantry.
Benjamin P. Runkel	Lieutenant-colonel Veteran Reserve Corps.	Major 45th Infantry.

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IN THE SENATE OF THE UNITED STATES.

APRIL 1, 1880.—Ordered to be printed.

MR. MAXEY, from the Committee on Military Affairs, submitted the following

VIEWS OF THE MINORITY.

[To accompany bills S. 192 and S. 577.]

The undersigned, minority of the Committee on Military Affairs, to whom was referred the bills (S. 192 and S. 577) to correct the dates of certain quartermasters of the United States Army, named in said bills, and certain amendments intended to be proposed to S. 192, respectfully dissent from the views reported by the majority, and for grounds of dissent present the following:

This subject was before the committee at the last Congress by the petition of the parties named in the above bills, which was referred to the committee, and by Senate bill 387, introduced by Mr. Dawes December 6, 1877, and which was also referred to the committee, and said bill was reported back adversely August 29, 1878, with majority report by Mr. Wadleigh and minority by Mr. Maxey. These reports were printed together, No. 293, second session Forty-fifth Congress. No further action was had on said bill and reports during that Congress. On the 25th March, 1879, Mr. Plumb introduced S. 192, and on the 9th of May, 1879, Mr. Butler introduced S. 577, and on January 21, 1880, Mr. Garland introduced an amendment to S. 192 proposed to be offered by him. These bills and this amendment were all referred to this committee. The question involved is important. The undersigned believe that it is due to the proper understanding of this question that their views, carefully considered after full investigation, should be in possession of the Senate.

Paragraph 19 of the "Revised United States Army Regulations, 1863," Article IV, Title "Appointment and promotion of commissioned officers," reads as follows:

All vacancies in established regiments and corps, to the rank of colonel, shall be filled by promotion, according to seniority, except in case of disability or other incompetency.

It is not pretended that petitioners were *disabled* or *otherwise incompetent*.

Does this regulation have the force of law and apply to petitioners?

Section 37 of the act to increase and fix the military peace establishment, approved July 28, 1866, directs the Secretary of War to have prepared and report at the next ensuing session a code of regulations for the government of the Army, &c., but further declares:

The existing regulations to remain in force until Congress shall have acted on said report.

The Attorney-General, under date of January 22, 1872, vol. xiv., Opinions of Attorneys-General, page 3, says:

No action has been taken by Congress in reference to any such report, and therefore the regulations referred to, by virtue of said section 37, have the force of law.

The opinion is clearly sustained by the very words of the law above quoted; so that a just construction of paragraph 19, Article IV, page 11, Army Regulations, 1863, should settle the question.

1st. What, then, is the true construction of the word "vacancies" in that paragraph?

It is insisted by the majority of the committee that the places claimed by petitioners were "original vacancies"; that the "vacancies" meant by paragraph 19 are such as result from casualties or "accidental vacancies," and therefore the paragraph does not apply. Is this a correct construction? In support of it reference was made in debate in the like case of Maj. William Myers in the Senate May 21, 1874, to Army Regulations May 1, 1813, to wit, "Original vacancies" will be supplied by selection; "accidental vacancies" by seniority, "excepting in extreme cases"; also, to Army Regulations of 1814, 1815, and 1821, where the same language is used, and to the Regulations of 1825, in which this language was used:

The Executive will fill original vacancies when created, by selection; accidental vacancies below the rank of brigadier-general, by promotion, according to seniority, except in extraordinary cases.

And to Regulations of 1841, which used this language:

Original vacancies will be supplied by selection; accidental vacancies to the rank of colonel, by promotion, in the order of seniority, except in extraordinary cases.

In like words are the Regulations of 1847.

It is insisted that this unbroken line of regulations, drawing the distinction between "original vacancies" and "accidental vacancies," running from 1811 to 1857, yet controls.

Senator Wadleigh, in the debate of May 21, 1874, said:

The rule has been from 1811 down to this time, as I understand, that original vacancies—that is, vacancies created by statute—should be supplied or filled by selection; but accidental vacancies, occurring in established regiments, or in established corps, should be filled by seniority, and such is the purport of the Army Regulations.

Is such the purport of the Army Regulations? All the regulations above quoted, down to and including the year 1847, clearly draw the distinction between "*original* vacancies"—that is, vacancies created by statute—and "*accidental* vacancies," such as are created by death, resignation, &c.

But in the Regulations of 1857 the language is essentially changed, to wit:

All vacancies in established regiments and corps, to the rank of colonel, shall be filled by promotion, according to seniority, except in case of disability or other incompetency.

And this identical language is used in the Army Regulations of 1861, and in the Revised Army Regulations of 1863. It will be observed that in all the regulations prior to 1857, "vacancies" were subdivided into two classes, "*original* vacancies" and "*accidental* vacancies"; the former to be filled by selection, and, of course, by the President, with the advice and consent of the Senate, and the President was in no wise limited in his nomination to the Army or to any part of it.

The second class, "accidental vacancies," was controlled by the rule of seniority. But in 1857 the regulations were changed so that "ALL

vacancies in established regiments and corps, to the rank of colonel, SHALL be filled by promotion, according to seniority, except in cases of disability or other incompetency," so that the marked change in the phraseology, the leaving off the qualifying words in previous regulations, "original" and "accidental," the substitution of the sweeping word "ALL" in lieu of these qualifying words, the leaving off the mode of filling "original vacancies" as it aforetime was, viz, "by selection," and providing that thenceforth ALL vacancies, to the rank of colonel, should be filled by promotion "according to seniority," makes it manifest that the change was intentional and for a purpose, and not accidental. Such a radical change cannot be charged to the chapter of accidents. And these Regulations of 1857 on this point were readopted in 1861 and in 1863, and are in force to-day.

Language could not possibly be plainer than paragraph 19, and its force is emphasized by the striking change from previous Regulations.

If the words "original" and "accidental," after being stricken out of the Regulations of 1857, had left the word "vacancies" without any qualifying word, and had left paragraph 19 to read, "Vacancies in established regiments and corps," &c., the law would have construed the word "vacancies" to embrace every kind, however created; but out of abundance of caution the paragraph 19 reads, "ALL VACANCIES," &c., so that it is impossible to construe or fritter away the power of this marked change in the manner of filling all vacancies, however created. It is said the law never does a vain or useless thing or a foolish thing. This change of language would have been vain, useless, and foolish, an unhappy delusion, if it had been intended to leave the regulations on this vital question as they were aforetime; and this paragraph 19 has, as before said, by section 37 of the act of July 28, 1866, all the binding force and efficacy of law. Such, it is submitted, is a just conclusion from the law. And this conclusion is fortified by the opinion of the Attorney-General (22 January, 1872), who uses this language:

I can find no grounds in the acts of Congress or Regulations of the Army touching this subject, for holding that the word "all" in the regulation referred to, means "accidental"; and I am therefore of the opinion that the vacancies in the Quartermaster's Department above assistant quartermaster, to the rank of colonel, created by said act of July 28, 1866, are to be filled by promotion according to seniority, and not at the option of the President and Senate. (Vol. 14 of Opinions, page 4.)

It is true that the Adjutant-General, in a communication to the committee, makes quite an ingenious reply to the foregoing opinion; but it is submitted that on a question of *law*—the construction of a statute—the opinion of the law officer of the government is of more worth than that of the Adjutant-General, and, as a rule, is a far safer guide.

Again, the precedents in precisely like cases sustain the petitioners. The case of Maj. William Myers is directly in point, and an act for his benefit was passed, and approved June 20, 1874, chapter 345, first session Forty-third Congress.

The case of Col. Nelson H. Davis, although in a different department of the Army (Inspector-General's), is governed by the same principle, and turns upon the same paragraph, 19. (See act for his relief, June 8, 1872, chapter 351, second session Forty-second Congress. Also, the case of Lieut. Col. Absalom Baird, Inspector-General's Department, act of June 16, 1874, chapter 290, first session, Forty-third Congress.)

So that we have three separate legislative constructions, all of the same tenor, and all sustaining the position of petitioners. The same principle is embodied in the act providing for retiring officers of the

Army, Navy, and Marine Corps, approved August 3, 1861, in the sixteenth section of which it is provided :

* * * and the next officer in rank shall be promoted to the place of the retired officer, according to the established rules of the service. And the same rule of promotion shall be applied successively to the vacancies consequent upon the retirement of an officer.

So it seems that Congress considered that the claim to promotion made by petitioners, to wit, by seniority, was "according to the established rules of the service."

The point on the word "vacancies," it is submitted, is clearly in favor of petitioners.

2d. But a point has been made on the word "established."

The minority of the committee submits that the Quartermaster's Department, as part of the Army organization, was "*established*" by the first act passed September 29, 1789, replaced by the act of April 30, 1790, organizing the Army, and has been *established* ever since *continuously*; that the *increase* or *decrease* of the department does not *disestablish* it, and with all deference this position is passed without further comment.

If wrong has been done it should be righted, and if the law has been violated it should be vindicated. That it has been we have three solemn acts of Congress affirming.

The wisdom of the principle of promotion by seniority to the rank of colonel, as settled in paragraph 19 of the Army Regulations, has been, so far as the minority of the committee is advised, recognized and acted on from the organization of the Army under the Constitution.

During the Mexican war one additional major was allowed to each of the eight regiments of infantry, the four regiments of artillery, and the two regiments of dragoons. (See ch. viii, sec. 3, U. S. Stat. at Large, vol. 9, page 124.)

Although these might have been held to be "original," not "accidental" vacancies, yet in every instance the promotion was by seniority. (See letter of Adjutant-General, presented with this report.)

During that war nine new regiments of infantry and one regiment of dragoons were created by law. (See vol. 9, U. S. Stat. at Large, pages 123, 124.) These regiments not being *established*, but *directed by law to be established*, were of course officered by selection; so the rifle regiment, created by law about the breaking out of that war, was officered by selection, *in order to establish it*; and in all these new regiments all officers were taken by selection, from colonel to the junior second lieutenant; but in the *established* regiments, as above stated, the "vacancy" created by adding the second major was filled by seniority, so that prior to the mandatory requirement by paragraph 19, to promote by seniority, the wisdom and sound policy of the rule was recognized.

The Constitution declares, "The Congress shall have power * * * to make rules for the government and regulation of the land and naval forces." (Art. 1, sec. 8, cl. 14.) *Congress has made rules for the government of the land and naval forces, and these rules were made long before the grievance complained of, and have been continuously in force since made to the present time. "By that Constitution and the laws authorized by it this question must be determined."*

If the law declares that "ALL vacancies in established regiments and corps to the rank of colonel *shall* be filled by promotion according to

seniority, except in case of disability or other incompetency," as it does, then the minority respectfully submits that it is not in the Constitutional power of the President, or of the President and Senate combined, to override, set aside, and annul the law.

The Constitution of the United States is a law for rulers and people equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. (*Ex-parte* Milligan, 4 Wallace, 120, 121.)

The minority is met by the argument *ab inconvenienti*, and it respectfully submits that the argument has no application whatever to Constitutional rights. The minority has confined its reasoning to the abstract question of Constitutional law and of rights under the law. As a question of sound public policy it is submitted that the prayer of the petitioners should be granted, and that the bill should pass.

The faithful officer who has served his country well in peace and in war anxiously looks for the plaudits of his countrymen and the "well done" of his superior officers.

Nothing can be more humiliating to such an officer than to find himself overslaughed at the moment he is justly expecting promotion. Such a policy would destroy the *morale* of officers and, of consequence, of the Army, and would leave the whole matter of promotion liable to whim or favoritism.

It is never too late to do right. If the law has been disregarded and thereby injustice has been done petitioners, as the minority believes, it ought now to be corrected. The minority feel satisfied that the questions of law and of right were not maturely considered when the nominations were sent in and acted on which overslaughed petitioners.

And those believing in this view are the more decided in the propriety of this recommendation from the fact, that if adopted, not only is no injustice done to any one, but it simply rearranges the list of colonels and lieutenant-colonels in the Quartermaster's Department without displacement of any one.

There is presented by the majority, in support of their views, a letter addressed by Gen. M. C. Meigs, Quartermaster-General, U. S. A., to Col. S. B. Holabird, deputy quartermaster-general, dated February 26, 1880, from which we make the following extract:

The argument has been made that the Regulations of 1857 changed the custom of the Army in regard to original appointments, and this argument has deceived many. It appears to me to be sufficient answer to say that no President can be assumed to have knowingly and designedly signed away, by approving in bulk a volume of general regulations for the Army, his Constitutional rights and prerogative; and that, if even one was found so base as to attempt to do this, he could not by so doing effect or diminish by a hair's breadth the rights and powers of his successors in the executive office.

I do not believe that the President of the United States who allowed the General Regulations of the Army of 1857 to be then promulgated knew or suspected that he would be considered to have abandoned an important part of those powers for the safety of the country, for the execution of the laws, which had been committed to his predecessor and to himself.

If such was the effect of the General Regulations of 1857, then their issue constituted, it seems to me, a fraud upon the President who permitted it, void in fact and in law as to the deluded President himself, and certainly without effect upon his successors.

As both the bills, S. 192 and S. 577, and the amendment proposed to be offered by Mr. Garland, were all before the committee prior to the date of this letter, and as this letter is not addressed to the presiding officer of the Senate nor the chairman of the committee nor any member of it, and was never referred to the committee, we do not perceive what it has to do with the case, unless for the supposed strength of the argument thought to be in the letter. The extract above criticises very severely,

1st, the Army regulations of 1857. Those regulations, revised in 1863, have been in force since 1857 to this day, continuously. The 37th section of the act approved July 28, 1866, volume 14, declares, after providing that the Secretary of War shall prepare and report to Congress a code of regulations for the government of the Army, &c., further declares, "The existing regulations to remain in force until Congress shall have acted on said report."

The Constitution declares that "The Congress shall have power" * * * "to make rules for the government and regulation of the land and naval forces." (Art. 1, sec. 8, ch. 14.)

The minority supposed that Congress was but exercising a Constitutional power in the enactment of section 37, act of July 28, 1866, and never had supposed that it was thereby invading the "Constitutional rights and prerogatives" of the President; for we had an idea that the President of the United States most happily had no "prerogatives," and no powers, by ancient prescription or otherwise, outside the powers granted by the Constitution. The regulation of 1857 on this point is *not* "a fraud upon the President," and is *not* "void in fact and in law," but *is* very wholesome law this day, in full force and effect, not only retained in the Regulations of 1861, but in the revision of 1863, confirmed by the act of 1866, and is part of the regulations for the government of the Army to-day. And yet, these regulations *must* be moved out of the way, and the law of July 28, 1866, *must* be considered null and void, before it is possible, in the judgment of the minority, to maintain the position assumed by the majority; and we give the Quartermaster-General credit for seeing the point in the case, although we dissent totally from his method of getting rid of the law. There the law stands, and upon the law the minority submits the case.

S. B. MAXEY.

A. E. BURNSIDE.